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No. - .

Supreme Court, U.S.
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In the
Supreme Court of the United States.

OCTOBER TERM, 1987

THOMAS ROBERTS AND HAIG ARAKELIAN,
PETITIONERS,

v.

SECRETARY OF LABOR, ET AL.,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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QUESTION PRESENTED

A provision of the Federal Employees Compensation Act, 5 U.S.C. 8128(b), prohibits judicial review of "[t]he action of the Secretary [of Labor] . . . in allowing or denying a payment . . . " under the Act. The question presented is:

> Whether 5 U.S.C. 8128(b) bars judicial review of generally applicable agency rulings for compliance with statute, as to which the decision below conflicts in principle with other circuits on an issue this Court has granted certiorari to review.

LIST OF PARTIES

The plaintiffs in the proceedings below were Francis Daniel Paluca, Helen Mahoney, Walter Barnes, Haig Arakelian and Thomas Roberts. Only Thomas Roberts and Haig Arakelian are petitioners before this Court. Messrs. Roberts and Arakelian are class representatives of a class of National Guard technicians certified pursuant to Fed. R. Civ. Proc. 23(b)(1)(A) and 23(b)(2).

Respondents, and defendants in the proceedings below, are the Secretary of Labor, the Assistant Secretary of Labor for Employment Standards, the Director of the Office of Workers Compensation, Employment Standards Administration, U.S. Department of Labor and the Associate Director of the Division of Federal Employees' Compensation, U.S. Department of Labor.

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1987

THOMAS ROBERTS and HAIG ARAKELIAN,

PETITIONERS

v.

SECRETARY OF LABOR, ET AL.,

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners Thomas Roberts and Haig Arakelian respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceeding on March 12, 1987 (Petitioners' Appendix ("Pet.

App.") 22a), rehearing with a suggestion for rehearing en banc having been denied on May 8, 1987 (Pet. App. 24a-25a).

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 813 F.2d 524, and is reprinted in the Petitioners' Appendix. Pet. App. 1a-2a.

The memorandum decision of the United States District Court for the District of Massachusetts (Keeton, D.J.) has not been reported. It is reprinted in the Petitioners' Appendix. Pet. App. 67a-77a.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22a) was entered on March 12, 1987. A petition for rehearing with a suggestion for rehearing en banc was denied on May 8,

1987 (Pet. App. 24a).

The jurisdiction of this Court to review the judgment of the First Circuit is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Federal Employees Compensation Act, 5 U.S.C. 8128, provides:

> (a) The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may --
>
> (1) end, decrease, or increase the compensation previously awarded; or
>
> (2) award compensation previously refused or discontinued.
>
> (b) The action of the Secretary or his designee in allowing or denying a payment under this subchapter is --
>
> (1) final and conclusive for all purposes and with respect to all questions of law and fact; and

> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.
>
> Credit shall be allowed in the accounts of a certifying or disbursing official for payments in accordance with that action.

38 U.S.C. 211(a) provides:

> (a) On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

STATEMENT OF THE CASE

Petitioners, Haig Arakelian and Thomas Roberts, are two named plaintiffs in an action instituted in the United States District Court for

the District of Massachusetts, pursuant to 28 U.S.C. 1331 (Pet. App. 34a), as a class action to challenge generally applicable rulings issued by the Secretary of Labor (FECA Program Memoranda Nos. 242 and 262). The rulings terminate the right of certain National Guard technicians, who were disabled as a result of their duties, to receive compensation for their disabilities under the Federal Employees Compensation Act ("FECA"), 5 U.S.C. 8101, et seq., the worker's compensation program for federal employees. Pet. App. 3a-4a.

Prior to January 1, 1969, National Guard technicians were considered to be employees of the states in which their units were located. As such, they were covered by state retirement and disability programs, and were not

permitted to participate in the federal civil retirement system, set forth in 5 U.S.C. 8331, et seq. See H.R. Rep. No. 1823, 90th Cong., 2d. Sess. (1968), reprinted in [1968] U.S. Code Cong. and Admin. News 3318, at 3319. They were, however, permitted to receive federal benefits under FECA for work-related illness or injury, in addition to any state retirement benefits, pursuant to a 1938 ruling of Department of Labor ("DOL"), which administers FECA.[1/] Pet. App. 4a, 36a, 48a.

In 1968, Congress passed the National Guard Technicians Act ("NGTA"), Pub. L. 90-486, 32 U.S.C. 709, which, inter alia, converted National Guard technicians from state to federal employment, effective

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1/ See Id., at 3322, 3325.

January 1, 1969, and permitted them to elect between coverage under state retirement programs and under the federal civil service retirement system. Between 1969 and 1978, DOL continued to permit those who elected, pursuant to the NGTA, to participate in state retirement systems to continue the concurrent receipt of FECA benefits for work-related illness, injury or death.

Each of the named plaintiffs in the district court[2/] had been employed, or survives one employed, by the Massachusetts National Guard prior to January 1, 1969, and chose to retain his or her membership in the

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2/ There were five named plaintiffs in the district court -- Francis Daniel Paluca, Helen Mahoney, Walter Barnes, Haig Arakelian and Thomas Roberts. Pet. App. 37a.

Massachusetts state retirement system after the passage of the NGTA. Each suffered, or survives one who suffered, work-related illness, injury or death in or before 1978, and qualified for and began receiving a Massachusetts Disability Retirement Allowance pursuant to Massachusetts General Laws ("M.G.L.") c. 32, §7. DOL notified all the named plaintiffs that they were also qualified for and could begin receiving FECA benefits. Pet. App. 4a-5a, 36a-37a, 78a.

On July 14, 1978, DOL changed its policy and issued FECA Memorandum 242 which stated that National Guard technicians would no longer be entitled to receive both FECA benefits and an annuity from a non-federal retirement system. DOL had determined that, under the NGTA, National Guard technicians'

non-federal retirement benefits stood in lieu of the federal civil service retirement system. Therefore, DOL ruled, the prohibition in 5 U.S.C. § 8116 on receiving other federal benefits concurrent with FECA benefits barred National Guard technicians from concurrent receipt of such non-federal retirement benefits. See Pet. App. 5a-6a, 39a-40a, 78a-79a. Pursuant to the subsequent requests of DOL resulting from FECA Memorandum 242, all of the named plaintiffs elected to receive their state annuities and waived or had terminated their FECA benefits. Pet. App. 79a-80a, 82a-83a.

A subsequent DOL ruling, FECA Memorandum 262, changed the effect of FECA Memorandum 242. It made the termination of FECA benefits effective only for claims finally adjudicated by

DOL after the date of FECA Memorandum 242, July 14, 1978, without respect to the date of injury. As a result, the FECA benefits of all named plaintiffs except petitioners Arakelian and Roberts were restored. Pet. App. 5a-6a, 34a, 36a-37a, 80a-81a.[3/]

The named plaintiffs sought review of the pertinent FECA Memoranda on behalf of themselves and all those similarly situated in the district court. They alleged that FECA Memorandum 242 was beyond the statutory

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3/ Although both were injured and filed FECA claims before July 14, 1978, the claims of petitioners Arakelian and Roberts were, unlike those of the other named plaintiffs, not adjudicated by DOL until after that date. Petitioners Arakelian and Roberts continued to press the lawsuit on the merits on behalf of the class. The other named plaintiffs remained as parties to press a claim for attorneys fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A), after final judgment in the district court. Pet. App. 81a-82a.

authority of DOL, and that both FECA Memoranda, read together, were unconstitutional. Pet. App. 6a. By order dated May 24, 1982 (Pet. App. 67a), the district court denied the government's motion to dismiss the complaint as barred by 5 U.S.C. 8128(b). It held that the statute did not, by "clear and convincing evidence", prohibit judicial review of generally applicable agency policies for compliance with statutory and constitutional mandates. Pet. App. 73a-75a. The district court cited Johnson v. Robison, 415 U.S. 361 (1974), where this Court held that 38 U.S.C. 211(a), a judicial review preclusion statute similar to that in FECA, did not bar review of constitutional challenges. It then adopted as controlling decisions of

several courts of appeals extending Johnson to hold that 38 U.S.C. 211(a) prohibited review only of individual agency decisions and not of general agency actions challenged as violating constitutional, statutory, regulatory or other restrictions.[4/]

Subsequently, the court certified a class action under Fed.R.Civ.Proc. 23(b)(1)(A) and 23(b)(2), with petitioners Arakelian and Roberts serving as representative parties. Pet. App. 54a. The class consists of all persons who:

4/ Wayne State University v. Cleland, 590 F.2d 627 (6th Cir. 1978); University of Maryland v. Cleland, 621 F.2d 98 (4th Cir. 1980); Merged Area X (Education) v. Cleland, 604 F.2d 1075 (8th Cir. 1979); Evergreen State College v. Cleland, 621 F.2d 1002 (9th Cir. 1980); Peed v. Cleland, 516 F. Supp. 469 (D. Md. 1981). Pet. App. 69a-74a.

(a) are or have been National Guard technicians originally hired before January 1, 1969, or their spouses and dependents, and

(b) except for the defendant's prohibition on dual benefit receipt, would be entitled to both FECA and non-federal retirement system benefits due to an employment-related death or injury.

Pet. App. 65a-66a. The district court noted that the interests of the petitioners were not coextensive with those of all members of the class, since petitioners could prevail in the litigation on either the equal protection or statutory claims. Pet. App. 58a-60a.[5/] Nevertheless, the

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5/ The petitioners' equal protection claim was based on the fact that they, like those permitted to retain their FECA benefits, were injured before July 14, 1978, and that the date of injury, not the date of final adjudication of their claims, was the date at which their expectation of

(footnote continued)

district court ruled that the petitioners were adequate representatives of the class and could be expected to press diligently their statutory claim. Pet. App. 60a-61a. Finally, the district court ruled that the class would be national in scope. Pet. App. 64a-65a.

In its merits decision (Pet. App. 33a), the district court held that DOL was without statutory authority under FECA, 5 U.S.C. 8116, or the NGTA, to issue FECA Memorandum 242. In view of its ruling on DOL's compliance with statute, the district court declined to address the constitutional claim of the

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(footnote continued)

receiving FECA benefits legitimately attached. Those members of the class injured after July 14, 1978 would not have such a claim and, therefore, could prevail only on the statutory claim. Id.

plaintiff class. Pet. App. 53a. The government appealed from both the 1982 jurisdictional and the 1985 merits decisions.[6/]

The court of appeals decision (Pet. App. 1a) vacated the district court's judgment. With respect to judicial review of constitutional challenges, the court followed this Court's decision in Johnson v. Robison, supra, interpreting 5 U.S.C. 8128(b) in the same fashion as this Court interpreted 38 U.S.C. 211(a), and noting their similarity. It held that the prohibition in 5 U.S.C. 8128(b) of review of the Secretary's action "under

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6/ The plaintiff class also appealed from the district court's subsequent denial of attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412 d(1)(A). That appeal was consolidated with the government's appeal, but was mooted by the court of appeals decision.

this subchapter" refers "to statutory, and not constitutional action." [Footnote omitted.] Pet. App. 7a-10a.[7/]

The court of appeals held, however, that 5 U.S.C. 8128(b) prohibited judicial review of policies enunciated in Program Memoranda as well as decisions in individual compensation cases, rejecting petitioners' claim that the prohibition referred to individual adjudication decisions alone. The court believed such an interpretation would distort the statute, permitting courts to strike down policy statements but allowing the Secretary of Labor to ignore court

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7/ The court also rejected the government's claim that the district court was ousted of jurisdiction to review the constitutional claim of the plaintiff class because that claim was insubstantial. Pet. App. 10a-13a.

rulings in individual adjudications, and encroaching on the Secretary's right to make determinations regarding compensation matters. Instead, the court held that the issuance of a FECA Program Memorandum "is simply a wholesale 'action . . . in allowing or denying a payment.' 5 U.S.C. §8128(b)," from which federal employees have no right to judicial review. Pet. App. 13a-17a.

The court rejected the district court's reliance on the circuit decisions extending this Court's decision in Johnson v. Robison, supra, finding more persuasive the contrary decisions of the Second and Federal circuits, holding 38 U.S.C. 211(a) prohibits judicial review of all agency actions, even review of generally applicable rules for compliance with

statute. Roberts v. Walters, 792 F.2d 1109 (Fed. Cir. 1986); Traynor v. Walters, 791 F.2d 226 (2nd Cir. 1986). Pet. App. 17a.[8/] It also cited Lindahl v. Office of Personnel Management, ___ U.S. ____, 105 S.Ct. 1620, 1672 and n. 13 (1985), where this Court mentioned both 5 U.S.C. 8128(b) and 38 U.S.C. 211(a) as examples of "unambiguous and comprehensive" statutes showing that "Congress intends to bar judicial review altogether." Pet. App. 17a-18a.

Finally, the court of appeals addressed this Court's decision in United States v. Lorenzetti, 467 U.S. 167 (1984), and similar cases (Pet. App. 18a-21a), where this Court decided

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8/ This court granted certiorari in Traynor v. Walters, supra, on March 9, 1987. ___ U.S. ____, 107 Sup. Ct. 1368 (1987).

a FECA compensation issue on statutory grounds, without reference to the section 8128(b) preclusion of judicial review. The court held that Lorenzetti was distinguishable from the instant case because the FECA payment at issue there had already been allowed and only subsequent reimbursement was sought.[9/] This factor, the court held, took the question outside the unreviewable discretion of the Secretary. In addition, the court found persuasive the failure of this Court to mention Lorenzetti in Lindahl v. Office of Personnel Management, supra. Pet. App. 18a-21a.

9/ Lorenzetti involved whether DOL properly requested, under 5 U.S.C. 8132, reimbursement from a FECA claimant of a third party tort judgment compensating him for non-economic injury.

As a result, the Court of Appeals vacated the 1982 order of the district court and remanded the case for proceedings consistent with its decision. Pet. App. 21a-23a.

REASONS FOR GRANTING THE PETITION

I

The issue presented is one of importance.

The interpretation of statutes limiting judicial review carries with it a strong presumption in favor of judicial review. Dunlop v. Bachowski, 421 U.S. 567 (1984). That presumption goes to the very core of our notion of government, which ensures every citizen the right to invoke the protection of the laws. Bowen v. Michigan Academy of Family Physicians, ___ U.S. ___, 106 S. Ct. 2133, 2135-36 (1986), citing Marbury v. Madison, 5 U.S. 137 (1803); United States v. Nourse, 34 U.S. 8

(1835). Before limiting judicial review, courts must find "persuasive reason" to believe and "clear and convincing" evidence that Congress intended that result. Abbott Laboratories v. Gardner, 387 U.S. 136, 140, 141 (1967). Therefore, where "substantial doubt about Congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." Block v. Community Nutritional Institute, 467 U.S. 340, 347 (1984).

The court of appeals' decision, without adequate textual analysis (see infra, pages 25-33), finds that Congress clearly intended to rebut the strong presumption in favor of judicial review in 5 U.S.C. 8128(b). That decision, by inference, permits the Secretary of Labor, on any issue

related to FECA, to issue generally applicable rulings which violate FECA. Thus, the decision implicates fundamental rights of petitioners and other citizens affected by that statute.

The importance of the issue itself is magnified by the fact that the court of appeals decision directly affects numerous persons in a nationwide class and deprives them of significant financial benefits. The number of people in the class affected, although specifically unknown, is quite large. See Pet. App. 57a. In addition, because the class is nationwide in scope, many of its members will be prejudiced by inclusion in the class. That is, since the court of appeals decision conflicts with the reasoning of other circuits in cases interpreting 38 U.S.C. 211(a) (see <u>infra</u>, pages

41-47) many class members undoubtedly reside in jurisdictions where their interests would have been decided differently. See infra, page 31, 45-46. Those class members, however, will likely be barred from further litigation of the issue decided.10/

The financial losses class members suffer as a result of the decision below are also specifically unknown but undeniably significant. The retroactive compensation due petitioners Roberts and Arakelian alone, through August, 1986, totalled approximately $240,000.00, and was accruing at a rate of approximately

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10/ Grigsby v. North Mississippi Medical Center, Inc., 586 F.2d 457 (5th Cir. 1978); Bowen v. General Motors Corporation, 685 F.2d 160 (6th Cir. 1982); Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239 (3rd Cir.), cert. denied, 421 U.S. 1011 (1975).

$2,700.00 every four weeks for both.

The Court should not delay review, even though the court of appeals vacated the district court's decision on jurisdiction and remanded the case for further proceedings. A portion of the class cannot prevail on the constitutional issue to be decided on remand because, unlike the remainder of the class, they were injured after the relevant date and have no equal protection complaint. See, supra, page 13 and Pet. App. 58a-60a. That portion of the class would seek certiorari on the issue of courts' jurisdiction to review their statutory claim no matter what the result on remand. Therefore, the denial of review by this Court now could not obviate the need for such review later. However, should the remainder of the class prevail on the

constitutional issue on remand, the portion of the class benefitted only by vindication on the statutory issue may have no means to seek certiorari review.

Thus, the court of appeals' decision is final as to a portion of the class which will be prejudiced by delay in certiorari review. Given, the importance of the issue presented, especially as it affects the interests of many class members nationwide, this Court should review the present petition.

II

The court of appeals interpretation of 5 U.S.C. 8128(b) was erroneous.

In holding that 5 U.S.C. 8128(b) prohibits judicial review of generally applicable agency rulings as well as the Secretary's decisions in

adjudications,[11] the court of appeals failed to provide an adequate analysis of the language of the statute itself, its required starting point.[12] It ignored that the statutory language, read in context, shows that the preclusion of judicial review is limited to decisions of the Secretary made as part of the adjudicatory process specifically set forth in 5 U.S.C. 8119-8128.

Section 8128 is the culmination of

11/ The court of appeals did not disagree with petitioners' contention that FECA Memorandum 242 was not the result of an adjudication, but instead was in the nature of a rule. See PBW Stock Exchange, Inc. v. Securities and Exchange Commission, 485 F.2d 718, 732 (3rd Cir.), cert. denied 416 U.S. 969 (1973); U.S. Department of Labor v. Kast Metals Corporation, 744 F.2d 1145, 1149 (5th Cir. 1984). Compare, 5 U.S.C. 551(4) with 5 U.S.C. 551(6) and (7).

12/ See Johnson v. Robison, 415 U.S. 360, 367-368 (1974).

the statutory scheme which precedes it in FECA, and which describes the proper procedure for filing, substantiating and adjudicating a FECA claim. After the filing and substantiation of a claim (5 U.S.C. 8119-8123), the Secretary or his designee makes an initial finding and award (5 U.S.C. 8124(a)). Section 8124(b)(1) then states that "[b]efore review under Section 8128(a) of this title" a claimant dissatisfied with the decision under Section 8124(a) may obtain an evidentiary hearing before a representative of the Office of Worker Compensation Programs ("OWCP"). See also 20 CFR §10.131-10.136; 5 U.S.C. 8125-8127. After such OWCP review, section 8128 provides the Secretary's final opportunity to rule as part of the statutory adjudication process.

Section 8128(a) permits the Secretary to approve, deny or change an individual FECA award or denial of award, at any time. Section 8128(b) then insulates "[t]he action of the Secretary or his designee in allowing or denying a payment under this subchapter . . . " from judicial review.

Falling as it does within the section of FECA which sets forth the process of adjudication before the agency, this preclusion provision was clearly calculated to refer back to the "the action of the Secretary" under 8128(a), which in turn is merely the last administrative step in the statutory adjudication process. Thus, the preclusion provision,[13/] read

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13/ The legislative history of the statute which added the judicial review

(footnote continued)

in context, plainly does not refer to the Secretary's separate power to promulgate rules and regulations under 5 U.S.C. 8149 or to decide policy questions under 5 U.S.C. 8145.14/

This reading of the statute is borne out by a textual comparison of 5 U.S.C. 8128(b) with 38 U.S.C. 211(a), the Veterans Administration judicial

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(footnote continued)

preclusion language to 5 U.S.C. 8128(b) does not elucidate its meaning. The present language was passed in the Act of July 28, 1945, ch. 328, § 4, 59 Stat. 504, with no Congressional discussion of the preclusion language. See S. Rep. No. 421, 79th Cong., 1st Sess. (1945) 65; 91 Cong. Rec. H. 7815-7817.

14/ The phrase "under this subchapter" does not broaden the reference in section 8128(b) to encompass those later-delineated policymaking powers of the Secretary. The phrase modifies "the action . . . allowing or denying a payment" and thus, like the rest of the section, refers only to actions in adjudicatory proceedings "under this subchapter."

review preclusion statute sometimes read together with 5 U.S.C. 8128(b). See Lindahl v. Office of Personnel Management, ____ U.S. ____, 105 S. Ct. 1620, 1627 and n. 13 (1985); Pet. App. 17a, 69a-74a. 38 U.S.C. 211(a) broadly precludes judicial review of "the decisions of the Administrator on any question of law or fact under any law administered by the Veterans Administration . . . ", apparently without specific limitation. FECA precludes judicial review only of "[t]he action of the Secretary . . . in allowing or denying a payment under this subchapter . . . ",[15/] and thus

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15/ The placement of the phrase "any question of law or fact" in each statute is also telling. In 38 U.S.C. 211(a) the phrase appears before the verb, as part of the sentence subject, thus making it part of the definition

(footnote continued)

contains specific self-narrowing language. In addition to having narrower language, 5 U.S.C. 8128(b) is set in a very different context from that of 38 U.S.C. 211(a). Unlike 5 U.S.C. 8128(b) (see supra, pages 26-28, 38 U.S.C. 211(a) is not anchored in the statutory adjudication process. The process for adminstrative review of veterans' claims is set forth separately in 38 U.S.C. 4001, et seq. These adjudications are handled entirely by the Board of Veterans' Appeals and do not appear to be

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(footnote continued)

of the agency action for which judicial review is precluded, and broadening the subject considerably. In contrast, the phrase appears in 5 U.S.C. 8128(b) after the verb, thus only defining the extent of finality to be attached to the subject agency action, but not broadening the definition of that agency action itself.

specifically referenced in any way by the language of § 211(a).

Nevertheless, many courts have found the language of 38 U.S.C. 211(a) specific enough to preclude only review of adjudicatory decisions and to be inapplicable to the review of rules forcompliance with statute (see infra, pages 41-42).16/ Even those courts disagreeing with this analysis of 38 U.S.C. 211(a) (see infra, pages 42-43) have recognized that the present version of the statute broadened the

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16/ In so ruling, those courts closely and thus, it would seem, correctly, followed this Court's analysis in Johnson v. Robison, supra, 415 U.S. at 373-374, regarding whether judicial review would unduly burden the courts and involve them in daily agency administration, or would frustrate any of the purposes of the Veterans Administrations statute. See Wayne State University v. Cleland, supra, 509 F.2d at 631. Those considerations also

(footnote continued)

scope of prior preclusion language which was more similar to that of 5 U.S.C. 8128(b).[17/] Thus, the

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(footnote continued)

support the type of judicial review sought here. Notwithstanding the view of the court of appeals (Pet. App. 16a), review of generally applicable rulings would not violate the purposes of FECA -- to avoid burdening the courts with a flood of small claims challenging the merits of compensation decisions, to leave the Secretary free to make choices associated with individual compensation decisions, and to insure uniformity in the interpretations and policies used to administer the FECA program. See Somma v. United States, 283, F.2d 149, 151 (3rd Cir. 1960); Rodrigues v. Donovan, 769 F.2d 1344, 1348 (9th Cir. 1985).

17/ Gott v. Walters, 756 F.2d 902, 908, vacated and reh'g. granted, 791 F.2d 172, remanded with instructions to dismiss as moot, 791 F.2d 172 (D.C. Cir. 1985). Circuit Judge Wald, in her dissent in that case (756 F.2d at 924), concluded that the prior language of § 211(a), prohibiting review of the "decisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans'

(footnote continued)

evidence of Congressional intent to limit the preclusion of review to review of adjudications is even greater in 5 U.S.C. 8128(b) than in 38 U.S.C. 211(a).

The court of appeals rejected the distinction offered by a textual analysis of 5 U.S.C. 8128(b) because it believed that a "FECA Program Memorandum is simply a wholesale action ' . . . in allowing or denying a payment.'" Pet. App. 16a. It may be true that Program Memoranda, like any rule, affect the results in adjudicatory decisions. However, they do not, in and of themselves, constitute the actual "action of the

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(footnote continued)

Administration" was clearly intended to preclude review only of individual benefit decisions.

Secretary . . . in allowing or denying" a FECA payment. Thus, FECA Program Memoranda cannot fall within the precise language of section 8128(b).

Nor would the narrower interpretation proposed by petitioners, as practical matter, produce the anomolous result, feared by the court of appeals, of leaving the Secretary free to ignore court rulings on Program Memoranda in individual adjudications. The Secretary of Labor has delegated his decision-making power granted by FECA in the adjudicatory process (5 U.S.C. 8124 and 8128(a)), to OWCP. 20 C.F.R. §10.2. OWCP has by regulation bound itself to apply FECA in adjudications in accordance with and as interpreted in court decisions (20 C.F.R. §10.150), making its failure to do so an arguable violation of due

process[18] within the jurisdiction of the courts to review. Thus, the court of appeals had no adequate reason to ignore the textual context of 5 U.S.C. 8128(b)[19] which clearly shows a basis to limit the preclusion of

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18/ Accardi v. Shaughnessy, 347 U.S. 260, 265-269 (1954); Payne v. Block, 751 F.2d 1191, 1192 (11th Cir. 1985); Government of Canal Zone v. Brooks, 427 F.2d 346, 347-348 (5th Cir. 1970); United States v. Heffner, 420 F.2d 809, 811-813 (4th Cir. 1970).

19/ The Court of Appeals was also influenced by the view that adjudications are "traditionally" accorded more judicial protection than rules. Pet. App. 14a-15a. The issue here is not, of course, what is traditional but what Congress intended. In any event, the cases cited for comparison (Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915) and Londoner v. Denver, 210 U.S. 373 (1908)) do not deal with the availability of judicial review but rather with whether those bound by adjudications or rules have a greater constitutional right to be heard personally by an agency (or local government) before it acts.

judicial review to review of adjudications. This Court's review is required to correct its errors.

III

The decision of the court of appeals conflicts with the decisions of this Court related to 5 U.S.C. 8128(b), which require clarification.

Two decisions of this Court which indirectly touch upon the nature of the review preclusion language in 5 U.S.C. 8128(b), Lindahl v. Office of Personnel Management, ___ U.S. ___, 105 S. Ct. 1620, 1627 and n. 14 (1985); and United States v. Lorenzetti, 467 U.S. 167 (1984), were considered by the court of appeals. These decisions, read together, caused confusion in the court below regarding the proper scope of 5 U.S.C. 8128(b) and were wrongly interpreted by that court.

The court of appeals mistakenly

differentiated from the instant case United States v. Lorenzetti, supra, and similar FECA cases where the jurisdiction of the courts was not questioned,[20/] on the ground that they involved subsequent reimbursement from a tort judgment of FECA payments already allowed. The court below held this was not an unreviewable act of discretion by the Secretary in "allowing or denying a payment." But the instant case is no different from the Lorenzetti situation in this respect. None of the class members here was denied FECA benefits as an initial matter on the merits of their claims. Instead, after initial

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20/ Green v. United States Department of Labor, 775 F.2d 964 (8th Cir. 1985); Ostrowski v. Roman Catholic Archdiocese of Detroit, 479 F. Supp. 200 (E.D. Mich. 1979), aff'd. 653 F.2d 229 (6th Cir. 1981).

approval in the adjudicatory process, each of their claims was only later discontinued (or never instituted) on the non-substantive ground that the NGTA changed their status (see supra, pages 7-9), much as the Lorenzetti claimants were later requested to reimburse approved benefits.

In actuality, the courts' jurisdiction in Lorenzetti and similar cases was unquestioned because, like here, each claimant sought review of the compliance with FECA of a generally applicable agency rule or policy imposed by the Secretary. Although each case involved a request of the Secretary of Labor that a claimant reimburse FECA funds after obtaining a tort judgment, none involved an appeal from an adjudication under 5 U.S.C. 8119-8128. Instead, the claimants

challenged the Secretary's authority to require such reimbursement as a general policy under 5 U.S.C. 8132 as interpreted in his own regulations, 20 C.F.R. §10.503. See Ostrowski v. Roman Catholic Archdiocese of Detroit, supra, 479 F. Supp. at 203-205, 653 F.2d at 230-231.

The court of appeals was strongly encouraged to ignore the clear import of Lorenzetti by its reading of this Court's statement in Lindahl v. Office of Personnel Management, ___ U.S. ___, 105 S. Ct. 620, 627 and n. 14 (1985), that the preclusion language in 5 U.S.C. 8128(b) and 38 U.S.C. 211(a) showed clear Congress' intent "to bar judicial review altogether". See supra, page 19. The court of appeals read far too much into this reference. The Court's concern there was whether a provision of the Civil Service

Retirement Act, 5 U.S.C. 8347(c), barred altogether judicial review of adjudications before the Merit Systems Protection Board or barred only review of the agency's factual determinations, ultimately concluding the latter. It did not address whether a judicial review preclusion statute could permit a distinction between review of adjudications and review of challenges to generally applicable rules for compliance with statute. The import of 5 U.S.C. 8128(b) and 38 U.S.C. 211(a) in Lindahl was that those statutes, in contrast to 5 U.S.C. 8347(c), contained specific language precluding review of the covered agency actions -- adjudications -- with respect to both

fact and law.[21]/

Thus, this Court's guidance is necessary to resolve the confusion of the court of appeals regarding this Court's precedent belating to the scope of 5 U.S.C. 8128(b), and to correct the lower court's inaccurate reading of those cases.

IV

The decision of the court of appeals joins, in principle, a conflict among the circuits over the scope of 38 U.S.C. 211(a), which this Court has granted certiorari to resolve.

A growing conflict has developed among the circuits regarding the proper

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21/ Were the court of appeals correct about the scope of the Lindahl reference, this Court would there have sub silencio invalidated the decisions of four circuits. See infra, pages 41-42. This Court would not ordinarily rule on important issues in that manner and, indeed, has recently granted certiorari to address the very point the court of appeals believed was resolved in Lindahl. See infra, pages 43-44.

interpretation of the scope of the judicial review preclusion language contained in 38 U.S.C. 211(a). Three circuits have followed the lead of the Sixth Circuit in Wayne State University v. Cleland, 590 F.2d 627 (6th Cir. 1978),[22/] and held that the statute does not prohibit judicial review of claims that the agency in general statements of policy and rules has violated its authority under statute. Those decisions were found of controlling persuasiveness by the district court in this case. See Pet. App. 74a. The Second and Federal Circuits have reached the opposite

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22/ See American Federation of Government Employees v. Nimmo, 711 F.2d 28, 31 (4th Cir. 1981); Evergreen State College v. Cleland, 621 F.2d 1002, 1008 (9th Cir. 1980); Merged Area X (Education) v. Cleland, 604 F.2d 1075, 1078 (8th Cir. 1979).

conclusion. Roberts v. Walters, 792 F.2d 1109 (Fed. Cir. 1986); Traynor v. Walters, 791 F.2d 226 (2d Cir. 1986), cert. granted ___ U.S. ___, 107 S. Ct. 1368 (1987). Despite the fact that both these decisions relied for their reasoning on a decision of the District of Columbia Circuit which was later vacated en banc and dismissed,[23] and Traynor is distinguishable,[24] the court of appeals here relied on them in analyzing the scope of the 5 U.S.C.

23/ Gott v. Walters, 756 F.2d 902, vacated and reh'g granted, 791 F.2d 172, remanded with instructions to dismiss as moot, 791 F.2d 172 (D.C. Cir. 1985).

24/ Traynor involved an appeal from a Veteran's Administration decision in an individual claims adjudication and not a broad challenge to agency policy or regulations, which fact the Second Circuit itself recognized as distinguishing it from the Wayne State cases. 791 F.2d at 230.

8128(b) to the same effect. Pet. App. 17a. In granting certiorari in Traynor, supra, which was consolidated for merits decision with a similar case from the District of Columbia Circuit[25/] this Court has decided to resolve the conflict with respect to 38 U.S.C. 211(a).

This Court should grant review here as well so as to include the instant case in the resolution of the conflict which will be addressed by the Court's

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25/ McKelvey v. Turnage, 792 F.2d 194 (D.C. Cir. 1986), cert. granted, ___ U.S. ___, 107 S. Ct. 1368 (1987). Traynor, supra, presents the initial issue of the proper scope of 38 U.S.C. 211(a) and the additional issue of whether review is otherwise available under the Rehabilitation Act of 1973, 29 U.S.C. 794, and, if so, the extent of recovery available under that statute. McKelvey, supra, because of a quirk in its procedural history, presents only the latter issue. The petitioners in those cases have filed their briefs on the merits and argument is set for December, 1987.

decision in Traynor, supra. While the instant case does not present precisely the same issue as that presented in Traynor, its involvement in the conflict is nevertheless quite real. Both the district court and the court of appeals treated the cases involved in the conflict as so substantially related in issue to the present case as to be controlling, a reading of the relationship encouraged by this Court's statements in Lindahl v. Office of Personnel Management, supra.

An additional problem presented by the conflict which this Court is about to resolve is that, given that the preclusionary language of 38 U.S.C. 211(a) is broader than that in 5 U.S.C. 8128(b) (see supra, pages 29-31), the court of appeals was wrong to rely on the Traynor analysis without comparing

the language of the two statutes. That is, since preclusion of review under 38 U.S.C. 211(a) is broader, if the Wayne State position in the conflict is correct,[26/] then the language of 5 U.S.C. 8128(b) would perforce not preclude judicial review here. However, should the Traynor position prevail, the issue here is not automatically decided as the court of appeals believed. Rather, further analysis would be required to determine whether the narrower language of 5 U.S.C. 8128(b) should be read the same way.

26/ Petitioners believe that it is since it is harmonious with this Court's analysis in Johnson v. Robison, supra, and the purposes of the Veterans Administration statutes. See supra, page 32. See also, Gott v. Walters, supra, dissent of Circuit Judge Wald, 756 F.2d at 918-929.

Given the part that the conflict over the scope of 38 U.S.C. 211(a) has played in this case, review must be granted so that this Court may preserve the effect of its decision in Traynor, and may resolve whatever additional issues are created by that decision in this case.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1548

FRANCIS DANIEL PALUCA, ET AL.,

Plaintiffs, Appellees,

v.

SECRETARY OF LABOR, ET AL.,

Defendants, Appellants.

No. 86-1549

FRANCIS DANIEL PALUCA, ET AL.,

Plaintiffs, Appellants,

v.

SECRETARY OF LABOR, ET AL.,

Defendants, Appellees.

APPEALS FROM THE UNITED STATES
DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

(Hon. Robert E. Keeton
U.S. District Judge)

Before

Coffin, Bownes and Torruella,

Circuit Judges

Jeanne K. Beck with whom George R. Salem, Solicitor of Labor, Allen H. Feldman, Associate Solicitor for Special Appellate and Supreme Court Litigation, and Carol A. De Deo, Deputy Associate Solicitor were on brief for Secretary of Labor.

Janet Steckel Lundberg with whom Richard M. Bluestein and Krokidas & Bluestein were on brief for Francis Daniel Paluca, et al.

March 12, 1987

TORRUELLA, Circuit Judge. We are required to determine the scope of judicial review under the Federal Employees Compensation Act ("FECA"). 5 U.S.C. §§ 8101 et seq. Specifically, we must consider whether

Section 8128(b) of the FECA[1/] prohibits courts from reviewing policy or rulemaking decisions of the Secretary of Labor ("Secretary") for conformance to the FECA, and whether that provision divests courts of authority to hear constitutional challenges to the Secretary's decisions under the FECA. We conclude that §8128(b) does preclude judicial review of the merits of policy or rulemaking decisions on statutory grounds, but does not impede the adjudication by the

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1/ 5 U.S.C. § 8128(b) provides:

The action of the Secretary or his designee in allowing or denying a payment under this subchapter is --

(1) final and conclusive for all purposes and with respect to all questions of law and fact; and

(2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

courts of constitutional issues such as those raised by plaintiffs in this case.

Background

Plaintiffs in this class action are National Guard technicians, or their survivors, who are covered by the Massachusetts state employee retirement benefit system. Each of them suffered a work related death or injury that would be sufficient to entitle them to FECA benefits, if they were eligible for those benefits. Whether they should be eligible is the substantive question underlying this dispute.

Prior to January 1, 1969, National Guard technicians were state employees. After that date, the National Guard Technicians Act made them federal employees, with the provision that technicians employed before 1969 could elect to be covered

by either their state or federal retirement benefit systems. See 32 U.S.C. § 709. Plaintiffs chose to remain within their Massachusetts retirement benefit system. Nevertheless, until 1978 plaintiffs and other technicians who stayed with their state benefits were eligible to receive FECA benefits as well. This FECA eligibility meant that state-covered technicians who suffered a work-related death or substantial injury would receive both state and federal benefits, unlike their counterparts who elected to switch to federal retirement benefits.

In 1978 the Department of Labor issued FECA Program Memorandum No. 242, which barred FECA benefits for the same work-related death or injury. Program Memorandum No. 262 made this

prohibition on dual benefits applicable only to FECA claims adjudicated after Program Memorandum No. 242 was issued (July 14, 1978). Plaintiffs were among those no longer eligible for the FECA benefits they had expected to receive. Plaintiffs brought suit in federal district court in Boston challenging the policy as contrary to the FECA and as a denial of equal protection under the due process clause of the fifth amendment. The district court ruled for plaintiffs on statutory grounds and the Secretary appealed.

Discussion

The FECA precludes judicial review of compensation decisions as follows:

> The action of the Secretary [of Labor] or his designee in allowing or denying a payment under this subchapter is --
>
> (1) final and conclusive for all purposes and with respect to all

> questions of law and fact; and
>
> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

5 U.S.C. § 8128(b). Appellants contend that, notwithstanding this language, district courts may review general policies or rules relating to FECA eligibility, both on statutory and on constitutional grounds. Because our decision as to constitutional and statutory review reflects quite different concerns, we will treat them separately.

A. Jurisdiction Over Constitutional Challenges

In deciding whether the district court has jurisdiction to hear plaintiffs' constitutional claim, we are guided by the Supreme Court's decision in Johnson v. Robison, 415 U.S. 361 (1974). In that case the

Court held that a statute prohibiting judicial review of the decisions of the Administrator of Veterans' Affairs did not prohibit review of constitutional questions. See 38 U.S.C. § 211(a).[2/] The Court noted that to hold otherwise "would, of course, raise serious questions concerning the constitutionality of § 211(a) . . . ." Johnson, 415 U.S. at 366. Applying the "cardinal principle that this Court will first ascertain whether a

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2/ 38 U.S.C. § 211(a) provides:

> [T]he decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

construction of the statute is fairly possible by which the [constitutional] question[s] may be avoided," Johnson, 415 U.S. at 367 (quoting United States v. Thirty-seven Photographs, 402 U.S. 363, 369 (1971)), the Court construed the phrase in § 211(a), the "decisions . . . under any law administered by the Veterans' Administration," to exclude constitutional issues. The Constitution is not a statute "administered by the Veterans' Administration." See Robinson, 415 U.S. at 367 (emphasis supplied).

In interpreting § 8128(b) in like fashion, we call attention to the similarity between that provision and § 211(a) of the Veterans' Act. See footnote 2 below. The phrase "[t]he action . . . under this subchapter" in Section 8128(b) refers to statutory,

and not constitutional, action. (Emphasis supplied). See Rodriguez v. Donovan, 769 F.2d 1344, 1347-48 (9th Cir. 1985). Accordingly, the district court has jurisdiction over constitutional challenges to the Secretary's actions administering the FECA.

Whether the district court has jurisdiction over the particular constitutional challenge in this case depends on whether it is, as the Secretary contends, "so attenuated and unsubstantial as to be absolutely devoid of merit." Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579 (1904); see Hagans v. Lavine, 415 U.S. 528, 536-38 (1974). Plaintiffs claim that the Secretary irrationally discriminated between the group composed of class members who were

injured and filed FECA claims prior to the date of FECA Memorandum 242, but whose claims had not been finally adjudicated, and the group composed of persons who were injured, had filed claims, and had begun receiving benefits by July, 1978. The only difference between the first group and some of the members of the second group is how quickly the Department of Labor processed their claims.

To withstand plaintiffs' equal protection challenge the Secretary would have to show that the policy had a legitimate purpose and that the classifications imposed were rationally related to that purpose and not arbitrary or irrational. See United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 174-77 (1980). In his brief, the Secretary claims that

the prospective application of FECA Memorandum 242 only to class members whose claims were adjudicated after July 14, 1978, serves the legitimate purpose of carrying out the Congressional intent in the FECA and the National Guard Technicians Act, while at the same time protecting the legitimate expectations of those class members already receiving dual benefits. The Secretary further argues that this classification is rational because an employee has no entitlement to FECA benefits until a final decision is made on a claim.

We will not comment on the merits of this defense other than to say that it is not strong enough to render the plaintiffs' equal protection challenge "wholly insubstantial." Bailey v. Patterson, 369 U.S. 31, 33 (1962).

Accordingly, the district court has jurisdiction. In the light of United States Retirement Board v. Fritz, supra, plaintiffs will have a difficult time invalidating the policy. Nevertheless, they are entitled to an opportunity to try. On remand the district court shall consider the merits of this constitutional challenge.

B. Jurisdiction over statutory challenges

The district court's decision below, and plaintiffs' defense of that decision on appeal, reads § 8128(b) as applying only to individual compensation decisions, and not to policies enunciated in Program Memoranda. Plaintiffs do not deny that Congress has the power, through a "clear command of the statute," Barlow v. Collins, 397 U.S. 159, 167 (1970),

to preclude review of policy decisions; however, they deny that the command is clear in this case. Plaintiffs read the phrase in §8128(b), the "action of the Secretary . . . in allowing or denying a payment," to refer to individual adjudications, alone.

This reading, however, distorts the statute. It would create the absurd result of permitting a court to strike down a policy statement of the Secretary, notwithstanding the court's inability to review any subsequent individual adjudications for conformance with its policy decision. As recently stated by the Court of Appeals for the District of Columbia, it is individual determinations that "have traditionally been accorded more rather than less judicial protection against agency error than generally

applicable rules. Compare Bi Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915) with Londoner v. Denver, 210 U.S. 373 (1908)." Gott v. Walters, 765 F.2d 902, 915 (1985) (Scalia, J.) vacated and reh'g granted, 791 F.2d 172, remanded with instructions to dismiss as moot, 791 F.2d 172 (D.C. Cir. 1985).[3/] Yet plaintiffs suggest that Congress intended the reverse when enacting § 8128(b). This suggestion makes no sense, because the Secretary would be free, in individual adjudications, to ignore anything we say, and because it conflicts with one

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3/ Gott concerned the question whether the 38 U.S.C. § 211(a) preclusion of review applied to challenges based on failure to observe the Administration Procedure Act's rulemaking procedures. That Administrative Procedure Act question is not presented here.

of the major purposes of § 8128(b): "that the Secretary should be free to make the policy choices associated with disability decisions." Rodrigues v. Donovan, 769 F.2d 1344, 1348 (9th Cir. 1985). Issuing an FECA Program Memorandum is simply a wholesale "action . . . in allowing or denying a payment." 5 U.S.C. § 8128(b). Federal employees have no right to appeal compensation decisions on FECA statutory grounds, whether these decisions are made individually or through broad-impact changes in policy. Congress gave the Secretary of Labor the unequivocal power to interpret and apply the FECA without "review by another official of the United States or by a court," id., as long, of course, as that power is not used in an unconstitutional manner.

See ante.

The district court's reliance on decisions extending Johnson v. Robison, supra, to permit judicial review of veterans benefit decisions on statutory grounds is misplaced. See, e.g., Wayne State University v. Cleland, 590 F.2d 627, 631-32 (6th Cir. 1978). We find the recent contrary decisions of the Second and the Federal Circuits more persuasive. See Roberts v. Walters, 792 F.2d 1109 (Fed. Cir. 1986); Traynor v. Walters, 791 F.2d 226 (2d Cir. 1986). As the Supreme Court recently noted, both 5 U.S.C. §8128(b) and 38 U.S.C. §211(a) are examples of "unambiguous and comprehensive language" showing that "Congress intends to bar judicial review altogether." Lindahl v. Office of Personnel Management, 105 S. Ct. 1620,

1627 and n. 13 (1985).

C. The Lorenzetti Problem

Plaintiffs point to the Lorenzetti case as one in which the Supreme Court decied an FECA compensation issue on statutory grounds, without reference to the §8128(b) preclusion of judicial review. See United States v. Lorenzetti, 467 U.S. 167 (1984); see also Green v. United States Dep't of Labor, 775 F.2d 964 (8th Cir. 1985) (deciding similar issue to Lorenzetti); Ostrowski v. Roman Catholic Archdiocese of Detroit, 479 F. Supp. 200 (E.D. Mich. 1979), aff'd, 653 F.2d 229 (6th Cir. 1981) (deciding nearly identical issues as Lorenzetti). Lorenzetti considered the following question:

> whether the United States may recover FECA payments for medical expenses and lost wages from an employee whose third-party tort recovery compensates him solely for

> noneconomic losses like pain and suffering.

467 U.S. at 168. Plaintiff Lorenzetti had won a tort judgment compensating him, under a state no-fault insurance statute, solely for noneconomic losses resulting from an injury for which he had previously received FECA benefits. The Secretary ordered him to reimburse the United States under 5 U.S.C. § 8132 for his FECA payments. The recipient refused and initiated the suit for declaratory judgment that culminated in the Lorenzetti opinion.

In reconciling Lorenzetti with our decision here, we note that in referring to § 8128 in Lindahl v. O.P.M., supra, the Court made no mention of the drastic limit on preclusion that plaintiffs argue follows from Lorenzetti. Instead, the

Court gave § 8128(b) as an example of "unambiguous and comprehensive language" that shows "Congress intends to bar judicial review altogether." 105 S. Ct. at 1627 & n.13.

Section 8128(b), as noted above, prohibits review of the "action of the Secretary . . . in allowing or denying a payment." (Emphasis supplied). In Lorenzetti the payment had already been allowed. Thus, the question had changed from one dealing with the unreviewable discretion of the Secretary - "allowing or denying a payment" - to one involving the question of reimbursement out of a tort judgment rendered under a state no-fault insurance statute.

Section 8128(b) does not preclude review of that question. Lorenzetti is thus distinguishable from the present

case.

Conclusion

In summary, § 8128(b) precludes judicial review of FECA Program Memoranda for compliance with the FECA, but not for compliance with the Constitution. The district court thus lacked jurisdiction over the plaintiff's FECA-based statutory challenge to Program Memorandum No. 242. Accordingly, the order of the district court below is vacated and the case is remanded for proceedings consistent with this decision.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1548.

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Plaintiffs, Appellees,

v.

SECRETARY OF LABOR, ET AL.,

Defendants, Appellants.

No. 86-1549

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v.

SECRETARY OF LABOR, ET AL.,

Defendants, Appellees.

JUDGMENT

Entered: March 12, 1987

These causes came on to be heard on appeals from the United States District Court for the District of Massachusetts,

and were argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is vacated and the case is remanded to the district court for further proceedings consistent with the opinion filed this day.

No Costs.

By the Court:

Francis P. Scigliano

Clerk

[cc: Ms. Beck and Ms. Lundberg]

UNITED STATES COURT OF APPEALS
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SECRETARY OF LABOR, ET AL.,

Defendants, Appellees.

Before

Campbell, Chief Judge,

Coffin, Bownes, Breyer, Torruella and Selya, Circuit Judges.

ORDER OF COURT

Entered: May 8, 1987

The panel of judges that rendered the decision in these cases having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be hereby denied.

By the Court:

Francis P. Scigliano

Clerk

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

FRANCIS DANIEL PALUCA, ET AL.,	*	
Plaintiffs,	*	CIVIL ACTION FILE NO.
v.	*	80-1661-K
WILLIAM E. BROCK, ET AL.,	*	
Defendants.	*	

JUDGMENT

For the reasons stated in the Court's Memorandum of September 19, 1985, it is ORDERED:

1. Defendants were without statutory authority to issue FECA Program Memorandum No. 242. 5 U.S.C. § 8116 does not prohibit the concurrent receipt of benefits under the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101 et seq. (FECA) by National

Guard Technicians or their spouses or dependents receiving state retirement benefits for the same work-related death or injury.

2. Defendants are enjoined to identify and pay, employing a procedure to be agreed to by the parties, back and future FECA benefits to all persons, including named plaintiffs Arakelian and Roberts, who were employed as National Guard Technicians on or before January 1, 1969, or their spouses and dependents, and whose benefits were withheld solely as a result of the enforcement of FECA Program Memorandum No. 242.

3. Defendants are enjoined to use their best efforts, employing a procedure to be agreed to by the parties, to identify and notify potential class members who did not

file a claim for FECA benefits and whose identities are presently unknown to the parties. All persons who were employed as National Guard Technicians on or before January 1, 1969, and who receive or received state retirement system benefits for a work-related death or injury and who may have been entitled to FECA benefits but who did not make or have adjudicated their claims after July 14, 1978, shall be treated as potential class members. Defendants shall request the assistance of the Air National Guard and Army National Guard, and shall take all other reasonable steps, in identifying and notifying such potential class members.

4. Defendants are enjoined to provide, employing a procedure to be agreed to by the parties, the potential

class members described in paragraph 3 with an opportunity to file their FECA claims and to have them adjudicated. Defendants are enjoined to pay FECA benefits which would have been paid but for the enforcement of FECA Program Memorandum No. 242, if the claim had been filed in a timely manner, to those potential class members who are adjudicated to be entitled to FECA benefits.

5. Defendants are enjoined to make their best efforts, employing a procedure to be agreed to by the parties, to identify all class members who are presently receiving FECA benefits who may also be entitled to receive state disability retirement benefits, and to notify such persons of their possible right to receive such state benefits.

6. The parties shall negotiate in good faith an agreement establishing (A) reasonable time periods for the actions to be taken by the defendants to comply with this judgment and (B) reasonable requirements of periodic reporting by defendants to plaintiff's counsel regarding the status of those actions.

7. The defendants shall disclose to plaintiffs' counsel the identities of the following:

a. All class members identified in connection with paragraph 2 above;

b. All potential class members identified in connection with paragraph 3 above;

c. All potential class members who file claims for FECA benefits for adjudication in connection with paragraph 4 above;

d. All persons who are identified pursuant to paragraph 5 above.

The information provided to plaintiffs' counsel in identifying these persons shall include their names, last known addresses, FECA claim numbers (if any) and their National Guard affiliation. All information provided pursuant to this paragraph shall be disclosed to plaintiffs' counsel only, and shall be used by them for the purposes of this litigation only and shall not be disclosed by them to any other person except as necessary in furtherance of this order.

8. All claims for FECA benefits filed as a result of this judgment shall be developed and adjudicated according to defendants' established procedures, except that these claims

for FECA benefits shall be treated as if they were received by defendants within 30 days of the date of injury or death, and defendants shall use their best efforts to afford them the usual priority over other claims subsequently received.

Robert E. Keeton
United States District Judge
Dated: 3/21/86
Boston, Massachusetts

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

FRANCIS DANIEL PALUCA, HELEN K. MAHONEY and HAIG ARAKELIAN,	*	
Plaintiffs,	*	CIVIL ACTION FILE NO. 80-1661-K
v.	*	
RAYMOND DONOVAN, ET AL.,	*	
Defendants.	*	

MEMORANDUM

September 19, 1985

Plaintiffs brought this action against defendants in federal court, alleging that certain interpretations by the defendants of the Federal Employees Compensation Act, 5 U.S.C. § 8116 (1982) (FECA), were contrary to the meaning and purpose of that statute and violative of the Equal Protection Clause of the Fourteenth Amendment.

The plaintiffs challenge FECA Program Memorandum Nos. 242 and 262. Memorandum No. 242 stated that henceforth, federal employees, including National Guard Technicians (Technicians), or their spouses, who had elected to remain under a state retirement system could not receive both state retirement benefits and FECA benefits awarded for the same work-related death or injury. Memorandum No. 262 made the ruling of No. 242 applicable only to an employee or spouse whose FECA claim was adjudicated after the date No. 242 was issued, July 14, 1978. This court has jurisdiction pursuant to 28 U.S.C. 1331 (1982).

On June 29, 1983, this court certified the plaintiffs as a class consisting of all persons who "(a) are

or have been National Guard Technicians originally hired before January 1, 1969, or their spouses and dependents, and (b) except for the defendants' prohibition of dual benefit receipt, would be entitled to both FECA and non-federal retirement system benefits due to an employment-related death or injury." Memorandum and Order June 29, 1983.

I.

The parties have stipulated to the facts necessary to the resolution of the statutory question in this case. The stipulated facts are, in essence, as follows. The named plaintiffs with one exception are all citizens of Massachusetts who were employed as National Guard Technicians immediately before January 1, 1969. The exception is Helen Mahoney whose husband was a

National Guard Technician killed in a work-related accident in 1961. Before January 1, 1969, all National Guard Technicians were state employees. After that date, all National Guard Technicians became federal employees pursuant to the National Guard Technicians Act, 32 U.S.C. § 709 (1982) (NGTA). The NGTA permits Technicians to elect either to remain under their state retirement system with the consent of the state or to enter the federal retirement system. The Commonwealth of Massachusetts permits those Technicians employed before January 1, 1969, to retain membership in the state retirment system. All of the named plaintiffs chose to remain under the state system. Each of the named plaintiffs except Mahoney suffered a work-related injury for

which he or she was eligible for FECA. Those named plaintiffs, Paluca, Mahoney and Barnes, who were entitled to FECA before July 14, 1978, receive both FECA benefits and benefits under the state retirement system because Memorandum No. 262 made the bar on double recovery applicable only to those recipients whose FECA claims were adjudicated after July 14, 1978. Because the named plaintiffs Arakelian and Roberts became entitled to FECA benefits after July 14, 1978, they have received only the state benefits.

II.

The plaintiffs claim that the Department of Labor misinterpreted the statutory scheme governing FECA and the Technicians in Memorandum No. 242 and thus acted in violation of its authority when it instituted the policy

expressed in that Memorandum. There are two statutes that bear on the receipt by National Guard Technicians of FECA benefits and state retirement benefits. First, the FECA statute itself, 5 U.S.C. §§ 8115, et seq., makes certain limitations on the receipt of FECA benefits in conjunction with other benefits. Under § 8116 an individual receiving FECA benefits may not also receive 1) "salary, pay, or renumeration of any type from the United States" except under four specified circumstances, § 8116(a); or 2) benefits from the United States Government pursuant to any other statute for the same death or injury for which FECA benefits are received, § 8116(b). This second limitation is of particular relevance to this case because it is that subsection that

prevents federal employees, including Technicians, from receiving both federal retirement benefits and FECA benefits for the same work-related death or injury.

The second relevant statute is the National Guard Technicians Act, 32 U.S.C. § 709 (1982) (NGTA). That statute changed all Technicians from state employees to federal employees as of January 1, 1969. The Act provided that those Technicians who were covered by state retirement plans could elect to remain under state coverage rather than switch to the federal retirement system.

In 1978 the Department of Labor issued an interpretation of § 8116 of FELA, (sic.) Memorandum No. 242, disallowing Technicians or their spouses from receiving both state

retirement benefits and FECA benefits for the same work-related death or injury. It is that interpretation that plaintiffs challenge at this phase of the proceedings.

The defendants argue that § 8116 manifests a purpose by Congress to prevent employees from being doubly compensated for the same injury. They argue further that Congress intended in the NGTA that Technicians who elected the state system were to do so in lieu of coming under the federal system. Under this characterization of the election established by Congress, a Technician chose between remaining under the exclusive protection of the state system, thus foregoing federal FECA benefits as well as federal retirement benefits, or coming under the federal system, thus having the

same choice as other federal employees between FECA and federal retirement benefits.

Plaintiffs attribute a different intent to Congress in both statutes. Plaintiffs contend that § 8116 manifests an intent to prevent double compensation only from federal government sources. The plaintiffs argue that because the language of the section refers only to benefits from the federal government, concurrent receipt of benefits from other sources, including the state, is not prohibited. Because, plaintiffs argue, the language of the section is unambiguous there is no need to delve further into congressional intent. But if such inquiry is made, plaintiffs argue that § 8116 was clearly intended only to apply to double compensation

from federal sources. They argue further that nothing in the NGTA upsets this interpretation. Plaintiffs argue that Congress knew that Technicians had been eligible for FECA since 1938, even though the Technicians were also entitled to state retirement benefits. Plaintiffs point out that Congress nowhere stated that the provision of concurrent FECA benefits would be eliminated for those Technicians choosing to remain under the retirement system. Plaintiffs argue that this silence indicates that Congress intended for that provision of concurrent benefits to continue to such state-covered Technicians even though Technicians choosing federal retirement coverage would be prohibited from receiving concurrent benefits.

III.

The courts must, of course, pay some deference to agency policy regarding the statutes the agency implements on a daily basis. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Where as here, however, that policy is based not on any factual expertise of the agency but is an interpretation of a statute, the justification for deference is considerably diminished. NLRB v. Hearst Publications Inc., 322 U.S. 111, 130-31 (1944). It is the role of the court to make determinations of statutory meaning and congressional intent. Id. Therefore, strong deference to the Department of Labor's interpretation in this instance is not appropriate.

Review of an agency interpretation

of a statute properly begins with an examination of the statute itself. Here, the defendants issued Memorandum No. 242 as an interpretation of § 8116. As stated above, that section prohibits the receipt of FECA benefits concurrently with other federal benefits of various kinds, including federal retirement benefits for the same work-related death or injury. On its face, the statute makes no mention of sources other than the federal government from which the employee may not receive benefits concurrently with FECA benefits. Neither state benefits nor any other non-federal benefits trigger the prohibition of § 8116, according to the language of the statute.

The defendants argue that despite the unambiguousness of the section, the

court should attempt to discern congressional intent. Normally, clear language makes such a search for legislative intent both unnecessary and improper. See Massachusetts Financial Services, Inc. v. Securities Investor Protection Corporation, 545 F.2d 754, 756-57 (1st Cir. 1976), cert. denied, 431 U.S. 904 (1977). Even if departure from this usual rule is appropriate in this case, I cannot agree with the characterization Congress' intent that defendants argue is suggested by the language of the section.

Defendants argue that the limitations created by the section manifest an intent by Congress to cut costs by prohibiting payment of FECA benefits where the employee is being compensated by other benefits. This interpretation is supported neither by

the language of the section nor by its legislative history. The language of the statute identifies only the United States Government as the source from which concurrent benefits may not be received. No other sources are mentioned, either specifically or by general reference. Furthermore, the legislative history indicates that Congress' concern in writing § 8116(b) was that in some circumstances "the United States has paid compensation twice for the same disability or death." S. Rep. No. 1924, 86th Cong., 2d Sess., 1968 U.S. Code Cong. & Admin. News 3569, 3573. Congress almost always has some cost-saving concerns when it is legislating with regard to the payment of benefits, and Congress clearly demonstrated that concern with respect to § 8116. However, in light

of the clear language of the section and its legislative history, I conclude that Congress focused its cost-saving concern with respect to FECA benefits on concurrent payments by the federal government, and not on the problem of dual benefits more generally.

This examination of § 8116 is not the end of the matter, however, because there is a second statute that is a part of the statutory scheme governing the Technicians and the benefits for which they are eligible. The NGTA, as discussed above, changed the status of Technicians from that of state employees to federal employees. The statute included various sections governing how salary, benefits, hiring, qualifications and other circumstances of employment were to be handled under this change of status. One section

provided for the election by Technicians employed before the effective date of the Act between remaining under the state retirement system and entering the federal retirement system. Unfortunately, Congress made no express provision for the treatment of FECA benefits with respect to Technicians who remained under the state retirement system.

Congress did recognize when it passed the Act that the Technicians, while state employees, had been eligible for FECA benefits for work-related death or injury, even though they might also be receiving state retirement benefits for the same death or injury. See H.R. Rep. No. 1823, 90th Cong., 2d Sess., 1968 U.S. Code Cong. & Admin. News 3318, 3322, 3325. But nowhere in either the

statute or the legislative history did Congress address the question whether Technicians so electing to remain under the state retirement system could continue to receive FECA benefits.

Congress stated that the Technicians would henceforth be "Federal Employees as a matter of law" and as such "would be covered under the laws providing for the various fringe benefits for Federal employees." Id. at 3324. This pronouncement is less than helpful for the purposes of this case, however, because two antithetical conclusions can be drawn from this statement with respect to the FECA issue. First, it could be argued that because no federal employee could receive both retirement benefits and FECA benefits, the Technicians as federal employees should also be so

prohibited. But it can also be argued that federal employees are prohibited only from receiving federal retirement benefits along with FECA benefits and that neither federal employees generally nor the Technicians in particular are prohibited from receiving non-federal retirement benefits concurrently with FECA benefits. This declaration by Congress that Technicians are to have the same statutory rights as other federal employees, therefore, does not advance the analysis in the direction of either plaintiffs' or defendants' interpretation, but brings the analysis back to the question of what limitations §8116 places on all federal employees eligible for FECA.

As I concluded above the limitations created by §8116 on receipt

of FECA benefits do not prohibit concurrent receipt of state benefits. In the NGTA Congress made the limitations of §8116 applicable to Technicians just as they are applicable to other federal employees. Congress placed no additional limitations on the special class of Technicians who elected to remain under the state system. Nor did Congress make any explicit suggestion that it meant to change the entitlement, existing since 1938, of Technicians receiving state retirement benefits to concurrent FECA benefits. Given this combination of declarations and silence, I conclude that there is no indication of congressional intent in NGTA to deny FECA benefits to Technicians remaining under the state system. No deviation from the unambiguous language of §8116

is warranted.

Defendants argue that it is anolmalous to allow Technicans to receive FECA benefits because they are under a state retirement system when they could not receive such benefits were they under the federal system. It is true the situation does present an apparent anomaly. However, such an apparent anomaly might be explained by the fact that Congress' concern was only with the federal government as a potential double payor and not with the various non-federal sources from which an employee might receive benefits. Moreover, even if there is no very compelling reason behind the apparent anomaly, it is not for the Department Labor, or the court, to rewrite a congressional statutory scheme merely because it perceives it to be imperfect.

IV.

Based on the foregoing reasons, I conclude that the defendants were without statutory authority to issue Memorandum No. 242 because that Memorandum misinterpreted the statutory scheme established by Congress. This determination makes the plaintiff's constitutional claim moot. A declaratory judgment of the court's ruling on the statutory question, entered this date, will be the final judgment in this case unless a request for modification is filed within ten days.

Robert E. Keeton

United State District Judge

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

FRANCIS DANIEL PALUCA, ET AL.,	*	
Plaintiffs,	*	CIVIL ACTION FILE NO. 80-1661-K
v.	*	
RAYMOND DONOVAN, ET AL.,	*	
Defendants.	*	

June 29, 1983

Memorandum and Order

This action is before the court on plaintiff's motion for class certification. The plaintiffs are former National Guard technicians[1/] who sustained employment-related injuries before July 14, 1978, and were

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1/ Plaintiff Mahoney is the spouse of a deceased National Guard technician who is eligible to receive F.E.C.A. and state benefits.

required as of that date to elect between receiving non-federal retirement system benefits and Federal Employee Compensation Act ("F.E.C.A.") benefits. Plaintiffs claim that (1) the defendants acted without statutory authority in requiring otherwise eligible recipients to choose between federal and non-federal benefits, and (2) even if this election requirement is authorized by statute, the defendants denied equal protection of the law to the plaintiffs.

All parties agree that plaintiff class certification is appropriate, but disagree on the definition of the class. The plaintiffs seek to represent a class of those present and former National Guard technicians and other National Guard employees (and their spouses and dependents) who would

be entitled to both F.E.C.A. and non-federal retirement system benefits for an employment-related death or injury but for the defendants' prohibition of dual benefit receipt. Alternatively, the plaintiffs propose to represent a class comprised of all such individuals whose entitlement stems from an employment-related death or injury incurred before July 14, 1978--the date on which the defendants instituted the election of benefits requirement.

The defendants propose to limit the class to Massachusetts National Guard technicians who became United States Air Force employees as of January 1, 1969, and were injured before July 14, 1978.

The numerosity and commonality

requirements of Rule 23(a) are not at issue here. The parties have stipulated that each of the plaintiffs' proposed classes is sufficiently numerous that joinder of all members is impracticable. Rule 23(a)(1).

The validity of the election of benefits requirements (as tested by statutory authorization) is a question of law common to the class, satisfying Rule 23(a)(2).

Each proposed class meets the class action requirements set forth in Rule 23(b). This class action may be maintained under Rule 23(b)(1)(A), because separate actions by individual class members might subject the defendants to incompatible standards of conduct. The defendants could be ordered to permit dual benefit payments in some cases, but not others.

Alternatively, this class action is maintainable under Rule 23(b)(2), because the defendants have uniformly prohibited receipt of dual benefits. Should the plaintiff prevail, the injuctive or declaratory relief with respect to the class as a whole would be appropriate.

The class action prerequisites set forth in Rule 23(a)(3) and (4) are intended to assure that the interests of absent class members will be protected by their representatives. I conclude that the named plaintiffs are adequate representatives of all class members, irrespective of date of injury.

Plaintiffs Arakelian and Roberts, the proposed class representatives, were injured before July 14, 1978, but their entitlement to F.E.C.A. benefits was determined after that date. They

assert that by requiring them to elect between F.E.C.A. and employment-related non-federal benefits, while permitting similarly-situated persons whose F.E.C.A. benefit entitlement was adjudicated before July 14, 1978 to receive dual benefits, the defendants denied them equal protection of the law. Individuals injured after July 14, 1978 cannot assert this equal protection claim.

Rule 23(a)(3) mandates that the claims of class representatives be typical of the claims of absent class members. Although the proposed representatives' interests do not conflict with the interests of those whose entitlement stems from death or injuries incurred before July 14, 1978, the claims are not coextensive. The proposed representatives could prevail

by showing only an equal protection violation, but other class members need to prove the statutory claim.

However, representatives are not disqualified merely because their interests extend beyond those of the class. Cf. G.A. Enterprises, Inc. v. Leisure Living Communities, Inc., 517 F.2d 24, 26 n. 3 (1st Cir. 1975) (stockholders derivative suit brought under Rule 23.1; court notes same analysis used as in Rules 23(a)(3) and (4). I find no ground to suppose that the proposed class representatives and their counsel would not diligently and zealously press their statutory claim. Strong incentives to do so exist. First, by succeeding in the statutory claim that they would avoid close and debatable legal issues that must be confronted in relation to the equal

protection claim. Second, the greater numbers of the class and the resulting scope of the relief obtained through success on the statutory claim may be relevant to the ancillary claim for attorney fees.

Rule 23(a)(4) requires that the representatives fairly and adequately protect the interests of the class. Despite the fact that the named plaintiffs have an additional claim not shared by those injured after July 14, 1978, I find that they have strong incentives to pursue the statutory claim as vigorously as if it were their sole basis for recovery. Therefore, the class should not be limited to those whose benefit eligibility stems from an employment-related death or injury occurring prior to July 14, 1978.

The plaintiff class is comprised of only those National Guard technicians (and their spouses and dependants) hired before January 1, 1969. On that date, pursuant to 32 U.S.C. §709, National Guard technicians became federal employees. Technicians hired on or after January 1, 1969 were required to participate in the federal Civil Service Retirement and Disability program. Only previously hired National Guard technicians had the option of remaining in non-federal retirement system. H.R. Rep. No. 1823, 90th Cong., 2d Sess., reprinted in [1968] U.S. Code Cong. & Ad. News 3318, 3338-3339.

The class is described with the necessary specificity. Although it includes National Guard technicians who may be injured in the future, it is

circumscribed by an objective and finite criterion--to wit, date of hire before January 1, 1969. Except in a Rule 23(b)(3) class action (requiring notice to each potential member), class members need not be precisely identifiable at the commencement of the action. See Yaffe v. Powers, 454 F.2d 1362, 1366 n.1 (1st Cir. 1972).

The plaintiffs propose that the class include National Guard employees, in addition to technicians, who would be eligible for dual benefit receipt but for the election of benefits requirement. The plaintiffs have made no showing that persons other than National Guard technicians are elegible for both F.E.C.A. and non-federal retirement system benefits. Absent a more particularized description of other National Guard employees who have

been affected by the defendants' prohibition of dual benefit receipt, the plaintiff class is limited to National Guard technicians, and their spouses and dependants.

There is no reason to limit the geographic scope of the plaintiff class. Although both representatives belonged to the Massachusetts National Guard before becoming federal employees, and participate in the Massachusetts retirement system, their claims in no way rest on this particularity.[2/] The constitutional and statutory claims asserted are equally relevant to National Guard

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2/ Similarly, the plaintiff class is not limited to those technicians who became United States Air Force employees as of January 1, 1969. It also includes technicians who became U.S. Army employees as of that date (and their spouses and dependents.)

technicians participating in other state retirement systems. The Supreme Court has emphasized that nothing in Rule 23 limits the geographic scope of an otherwise proper class action. Califano v. Yamasaki, 442 U.S. 682, 702 (1979).

ORDER

For the reasons stated in this Memorandum, it is ORDERED that this action may proceed as a class action under F.R.C.P. 23(b)(1)(A) and 23(b)(2), with the named plaintiffs Arakelian and Roberts serving as representative parties.

The plaintiff class consists of all persons who:

(a) are or have been National Guard technicians originally hired before January 1, 1969, or their spouses or dependents, and

(b) except for the defendants' prohibition of dual benefit receipt, would be entitled to both F.E.C.A. and non-federal retirement system benefits due to an employment-related death or injury.

Robert E. Keeton
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

FRANCIS DANIEL PALUCA, ET AL.,	
Plaintiffs,	
v.	CIVIL ACTION FILE NO. 80-1661-K
F. RAY MARSHALL, ET AL.,	
Defendants.	

May 24, 1982

Memorandum and Order

Defendants' Motion to Dismiss now before the court, is grounded on the assertion that this action is an attempt to obtain judicial review of agency action that is precluded by the following provision of the Federal Employees' Compensation Act:

> The action of the Secretary [of Labor] or his designee in allowing or denying a payment under this subchapter is--

> (1) final and conclusive for all purposes and with respect to all questions of law and fact; and
>
> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.
>
> . . .

5 U.S.C. §8128(b). Citing Barlow v. Collins, 397 U.S. 159 (1970), defendants contend that this provision constitutes a "clear command of the statute," id. at 167, precluding judicial review of agency action. See also Briscoe v. Bell, 432 U.S. 404 (1977); Waters v. United States, 458 F.2d 20 (8th Cir. 1972); Carter v. Cleland, 643 F.2d 1 (D.C. Cir. 1980); Pittman v. United States, 312 F. Supp. 818 (E.D. Va. 1970). As Barlow recognizes, however, the rule invoked by defendants applies only where the command is clear.

In Johnson v. Robinson, 415 U.S. 361 (1974), the Court considered a challenge to jurisdiction founded on 38 U.S.C. §211(a), prohibiting judicial review of decisions of the Administrator of Veterans Affairs denying veterans' educational benefits. Noting that the claimant was challenging the constitutionality of veterans' benefit legislation, the Court reasoned:

> Plainly, no explicit provision of §211(a) bars judicial consideration of appellee's constitutional claims. That section provides that "the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive and no . . . court of the United States shall have power or jurisdiction to review any such decision . . ." (Emphasis added.) The prohibitions would appear to be aimed at review only of those decisions of law or fact that arise in the administration by the Veterans'

> Administration of a statute providing benefits for veterans. A decision of law or fact "under" a statute is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts. Appellee's constitutional challenge is not to any such decision of the Administrator, but rather to a secision (sic.) of Congress to create a statutory class entitled to benefits that does not include I-O conscientious objectors who performed alternative civilian service. Thus, as the District Court stated: "The questions of law presented in these proceedings arise under the Constitution, not under the statute whose validity is challenged." 352 F. Supp., at 853.

Id. at 367. The Court proceeded to examine administrative practice and legislative history, finding that neither supported an interpretation of the statute as purporting to bar judicial review of constitutional questions. Id. at 367-74, citing Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967) ("clear and

convincing" evidence of congressional intent required before a statute will be construed to restrict access to judicial review). See also Ralpho v. Bell, 569 F.2d 607, 618-22, rehearing denied, 569 F.2d 636 (D.C. Cir. 1977) (judicial review of due process claim challenging decision of Micronesion Claims Act not barred).

Other decisions have extended this principle beyond claims of agency violation of constitutional restrictions. Thus, juducial review may be available where the statute precludes review of individual decisions but the review sought is not of that nature but instead is based on

> a claim that the agency has violated constitutional statutory, regulatory or other restrictions, ...

Garcia v. Neagle, 660 F.2d 983, 988-989

(4th Cir. 1981), cert. denied, ___ U.S.___, 50 U.S.L.W. 3548 (Jan. 11, 1982). As expressed in Ness Inv. Corp. v. United States Dept. of Agr., Forest Service, 512 F.2d 706 (9th Cir. 1975),

> Where consideration of the language, purpose and history of a statute indicates that action taken thereunder has been committed to agency discretion: (1) a federal court has jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion involves violation by the agency of constitutional, statutory, regulatory or other legal mandates or restrictions; (2) but a federal court does not have jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion consists only of the making of an informed judgment by the agency.

Id. at 715. See also Oestereich v. Selective Service Board, 393 U.S. 233, 238-39 (1968); Ralpho v. Bell, supra, at 622-26; Wayne State University v. Cleland, 590 F.2d 627, 631-32 (6th Cir. 1978); University of Maryland v.

Cleland, 621 F.2d 98, 100-01 (4th Cir. 1980); Merged Area X (Education) v. Cleland, 604 F.2d 1075, 1078 (8th Cir. 1979); Evergreen State College v. Cleland, 621 F.2d 1002, 1008 (9th Cir. 1980); Peed v. Cleland, 516 F. Supp. 469, 476 (D. Md. 1981). Compare the treatment of the Portal-to-Portal question in P. Bator, D. Shapiro, P. Mishkin and H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 322-24 (2d ed. 1973).

The claims asserted by the plaintiffs in this action are claims that the agency has violated constitutionally protected rights of the plaintiffs, and has violated congressional mandates appearing in the Federal Employees' Compensation Act, as properly construed. For example, plaintiffs claim violations by the

agency's adopting a policy prohibiting the plaintiffs and others similarly situated from receiving FECA benefits if they also receive state or local employment-related retirement or disability benefits and by the agency's applying that policy retroactively. Under the controlling precedents, cited above, the agency action challenged here is not action "allowing or denying a payment under" the Federal Employees' Compensation Act, as that phrase is used in 5 U.S.C. §8128(b) but is instead a claim that the agency has violated constitutional and statutory mandates applicable generally to plaintiffs and others similarly situated.

Defendants have not produced clear and convincing evidence of congressional intent to preclude

judicial review of the type plaintiffs seek. Reading the statute invoked here, in light of the relevant precedents, as not purporting to preclude the judicial review plaintiffs seek here, I need not and do not reach constitutional issues that might be presented under a different reading of the statute. See, e.g., Johnson v. Robison, 415 U.S. at 366-67.

Defendants' argument that this action should be dismissed for failure to exhaust administrative remedies is plainly without merit in view of the defendants' response to this court's inquiry about the basis for defendants' denial of plaintiffs' claims. Plaintiffs need not pursue further administrative claims that defendants' position before this court demonstrate to be futile. See, e.g., Bradley v.

Laird, 449 F.2d 898, 900-01 (10th Cir. 1971).

Defendants' argument for dismissal on the ground that certain plaintiffs' claims are moot is also without merit. Other claims would remain at issue in any event. Moreover since class action relief is being sought and the court has not yet considered the motion for certification of a class, defendants' acknowledgement of the entitlement of Paluca and Mahoney to benefits does not render moot the claims for class action relief they have alleged. Questions regarding whether either or both of them may appropriately represent a class, as well as the questions whether a class is to be certified, are not before the court on the motion to dismiss.

ORDER

For the reasons stated above, it is ordered: Defendant ' Motion to Dismiss is denied.

Robert E. Keeton
United States District Judge.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

FRANCIS DANIEL PALUCA, et al.,	)	
Plaintiffs	)	CIVIL ACTION
v.	)	No. 80-1661-K
RAYMOND DONOVAN, et al.,	)	
Defendants	)	

STIPULATION OF FACTS

* * *

27. Between January 1, 1969 and July, 1978, DOL permitted persons such as plaintiffs to receive FECA benefits in addition to state disability retirement benefits. On or about July 14, 1978, the OWCP issued FECA Program Memorandum No. 242 under the signature of defendant McLellan. That memorandum set forth the defendants' interpretation that 5 USC 8116: (1)

prohibits persons who were receiving FECA benefits from receiving at the same time any state or local employment-related annuities or benefits to which they were also entitled; and (2) requires such persons to elect between the FECA and state or local benefits. A copy of FECA Program Memorandum No. 242 is attached hereto and labeled "A".

28. Although the defendants had determined the eligibility for FECA benefits of Paluca, Mahoney and Barnes prior to July 14, 1978, the date of FECA Program Memorandum No. 242, Paluca, Mahoney and Barnes were notified on various dates in 1979 that they would be required to make an election between FECA benefits and state retirement or disability benefits pursuant to FECA Program Memorandum No.

242. Prior to their receipt of such notification, the three above-named plaintiffs had received benefits from the Commonwealth of Massachusetts on account of an employment-related disability or death in addition to their FECA benefits. After their receipt of notification from the defendants concerning the implementation of FECA Program Memorandum 242, the FECA benefits received by Paluca, Mahoney and Barnes were terminated.

29. On May 7, 1980 (as revised November 10, 1980), after this action was filed and as a result of this action,[1/] the defendants issued another interpretation of 5 U.S.C. 8116

1/ See Memorandum for Daniel Sullivan from Albert Ross, dated October 30, 1980, attached hereto and labeled "B".

in FECA Program Memorandum No. 262. That memorandum stated that the provisions of FECA Program Memorandum No. 242 would be applied only to individuals like plaintiff class representatives Arakelian and Roberts, whose entitlements to FECA benefits were adjudicated by the Secretary of Labor after July 14, 1978, the date of issue of Program Memorandum No. 242. Therefore, the election of benefits required by FECA Program Memorandum No. 242 would apply only in such cases. A copy of FECA Program Memorandum No. 262, as revised, is attached hereto and labeled "C".

30. Pursuant to the policy change set forth in FECA Program Memorandum No. 262, the defendants reinstated the FECA benefits of Paluca, Mahoney and Barnes. As a result, these plaintiffs

received retroactive FECA payments and continued to receive FECA payments on a monthly basis. The plaintiffs Paluca, Mahoney and Barnes assert continuing claims for attorneys' fees under the Equal Access to Justice Act, as codified in 28 U.S.C. §2412.

31. Class representatives Arakelian and Roberts would be entitled to receive FECA benefits but for the defendants' policies as set forth in FECA Program Memorandum Nos. 242 and 262. However, because their claims for FECA disability payments were finally adjudicated after July 14, 1978 (¶¶23 and 26, supra), defendants' policies set forth in Memorandum 242 and 262 required Arakelian and Roberts were required to elect between FECA and state disability benefits. Because they each elected state disability

retirement benefits, neither receives any FECA benefits. Roberts' FECA benefits were terminated in December, 1980. Arakelian has never received FECA benefits.

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